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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 19[illegible]

No. [illegible] 718

WILLIAM C. ATWATER AND COMPANY, INC., APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 8, 1971.

(28,593)

(28,593)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 638.

WILLIAM C. ATWATER AND COMPANY, INC., APPELLANT,

vs.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 28, 1922.

1

Court of Claims.

No. 34215.

WILLIAM C. ATWATER & COMPANY, INCORPORATED,

vs.

THE UNITED STATES.

1. *Petition and Amended Petition.*

On October 21, 1919, the plaintiff filed its original petition. On August 2, 1921, on motion made therefor and allowed by the Court, the plaintiff filed amendments to the petition so that same now as follows:

To the Honorable the Chief Justice and the Judges of the Court of Claims of the United States:

The Claimant, Wm. C. Atwater & Company, Inc., respectfully represents and alleges:

1. That your petitioner is and has been at all times herein mentioned a corporation of the State of New York engaged in the business of shipping Pocahontas Smokeless Coal and Coke, having its office and principal place of business at No. 1 Broadway, New York City, and operating branch offices in Boston, Norfolk, Cleveland, Bluefield, London and elsewhere.

2. That on June 5, 1916, a contract, being No. 26488, was entered into between Wm. C. Atwater & Company, Inc., and the United States through its Navy Department represented by the Paymaster General of the Navy, for "furnishing the following articles to be delivered at the place and within the time stated for each class, and at the price set opposite each item, respectively, and, unless
2 otherwise provided, to be subject to the terms of the above contract quoted on the back hereof." That pursuant to the express terms of the contract as set out under clause 18, stock classification No. 8, the claimant obligated to supply 200,000 tons steaming coal for delivery f. o. b. vessels or barges under chutes at respective piers, Hampton Roads, Virginia, at and for the sum of $2.80 per ton, or a total for the 200,000 tons of $560,000. A true and correct copy of the said contract is hereto attached and made a part hereof, marked Exhibit A.

3. That at the time of the making of the said contract, the United States, in order to require claimant to deliver only such portion or portions of said coal, so contracted for, as might be needed for the naval service at the place named and for the period of the contract, and also in order to relieve the United States from liability for fail-

ure to order the full amount of said coal, so contracted for, caused the following provision to be incorporated in said contract, to wit:

"It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantity of the coal specified which may be needed for the naval service at the places named during the period from July 1, 1916, to June 30, 1917, irrespective of the estimated quantities stated, the Government not being obligated to order any specific quantity."

4. That the 200,000 tons of coal so contracted for was but a portion of the quantity required in the proposal for bids, issued by the Navy Department; and in submitting a bid for an amount less than the entire quantity, the claimant was acting in accordance
3 with the following provision of the said proposal, the same provision being also incorporated in the specifications attached to and made a part of the contract:

"Bids on less than the entire quantity of coal specified under each clause will be received and considered. Such partial bids must state the amount of tonnage it is proposed to furnish subject to the other conditions of the specifications."

5. That by letter dated the 26th day of March, 1917, the United States acting through its said Navy Department, represented by the Paymaster General of the Navy notified the claimant that pursuant to the quantities clause of the general specifications of the contract, the partial tonnage to be required under the contract would exceed the quantity stated by about 10 per cent and in accordance with construction, the United States subsequently insisted upon the delivery of 20,000 tons in addition to the 200,000 tons specified in the said contract.

6. That the claimant, in numerous letters and telegrams protested against the construction thus imposed upon the contract and denied that the claimant was liable under said contract to be required by the United States, through its said Navy Department, to furnish said additional coal.

7. That the United States acting through its said Navy Department and relying upon the provisions of said contract set out in Section 3 of this petition, asserted and claimed that claimant was required by the terms of said contract to accept and supply orders for additional coal in excess of the amount expressly stated in the contract.

8. That subsequent to denial by the claimant of its obligation to deliver under the contract coal in excess of the stated quan-
4 tity, the claimant in numerous letters referred the attention of the United States through its said Navy Department to the following provision of the general specifications and conditions of the contract:

"Contractors will not be held responsible for fulfillment of their contracts during any war in which the United States may be en-

gaged and which may affect them, or if prevented from doing so by strikes or combinations of miners, laborers, or boatmen, accidents at the mines, or interruption or shortage of transportation. In such cases the obligation to deliver coal under their contracts will be cancelled to an extent corresponding to the extent or duration of such war, strikes, combinations, accidents, interruption, or shortage, and no liability shall be incurred by the contractors for damages resulting from their inability to fulfill their contracts on account of the aforementioned causes."

That claimant relying upon the aforesaid provision, proposed to the United States a novation in the nature of a compromise agreement under which should the United States through its said Navy Department agree to the reduction of the alleged obligation to an extent corresponding to the extent of the shortage of transportation existent during the period of the contract, the claimant would agree to deliver coal up to the amount of 211,781 tons at $2.80 per ton, the contract price. That the United States acting through its said Navy Department, refused the offer of the claimant to a compromise agreement and continued to demand the furnishing of the entire additional tonnage. That, following the refusal of the Navy Department to favorably consider the offer of compromise duly submitted to it by the claimant, the claimant brought the matter to the attention of the Hon. Josephus Daniels, Secretary of the Navy, and that no response, favorable or unfavorable, was had by the claimant.

9. That, thereafter, claimant still so denying the right of the United States to require claimant to furnish such additional tonnage and still protesting against being required to do so under the terms of the contract, by reason of and because of the immediate and urgent need of the United States for said coal and because of a desire to lend all possible assistance to the Government in the trying time delivered to the Navy Department 19,990,400 tons of coal in excess of the quantity stated in the said contract. That at the time of said delivery of said excess tonnage, the fair and reasonable price of the coal was $6.50 per ton or $3.70 more than the contract price.

10. That the United States asserted the right to require claimant to accept the price provided for in said contract for the coal so furnished in excess of the tonnage provided for in said contract. That claimant continued to present to the Navy Department the said compromise offer, and that the Navy Department declined in every instance to report favorably on the same. That the claimant agreed to accept payment on account of the basis of the price specified in the said contract and expressly reserved the right to submit claim for the balance due. That the United States paid to the claimant a sum of money equal to the value of said additional tonnage if furnished under said contract, which sum the claimant accepted and has credited to the account of the United States as partial payment for said coal. That the United States has refused to pay the claimant the differ-

ence between the said contract price and the market value of the said coal; that the amount of said difference is $73,964.48.

6 11. That no action upon your petitioner's foregoing claim has been had before Congress or in either House thereof. That such claim was presented to the Navy Department and payment thereof refused by said Department. That claimant appealed from this decision of the Navy Department to the Treasury Department and that said Treasury Department refused to authorize the payment of said claim. That the claimant is the sole owner thereof and the only party interested therein and that no assignment or transfer of the said claim or any part thereof or any interest therein has been made; that this claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; and that this claimant has at all times borne true allegiance to the Government of the United States and has not in any way aided or abetted or given encouragement to rebellion against the said Government.

Wherefore your claimant prays:

1. That the Court will render a judgment against the United States in favor of your claimant for the payment by the United States to your petitioner of the said sum of $73,964.48.

2. That your claimant may have such other and further relief as justice and the exigencies of its case may require.

WM. C. ATWATER & COMPANY, INC.,
By WM. C. ATWATER, *President.*

BAKER & BAKER,
Attorneys of Record.

7 STATE OF NEW YORK,
County of New York, ss:

Before me, a Notary Public in and for the State and County aforesaid personally came Wm. C. Atwater who being duly sworn saith that he is the President of the William C. Atwater & Co., Inc., petitioner in the foregoing petition and that the statements therein are just and true to the best of his information and belief.

Sworn and subscribed to before me this 14th day of October, 1919.

[SEAL.] GEO. D. KLIPPEL,
Notary Public, Kings County, No. 180.

Kings County Register No. 1017.
New York County Clerk's No. 29.
New York County Register No. 1108.

8

EXHIBIT "A."

Contract No. 26488.

N. S. A. 505.
Opening May 5, 1916.

Navy Department,

Bureau of Supplies and Accounts.

Washington, D. C., June 5, 1916.

SIR:

A contract numbered as stated above and dated June 5, 1916, has been entered into with Wm. C. Atwater & Co., Inc., of 1 Broadway, New York, N. Y., for furnishing the fol-owing articles to be delivered at the place and within the time stated for each class, and at the price set opposite each item, respectively, and, unless otherwise provided, to be subject to the terms of the above contract quoted on the back hereof:

Class 18—(Bu. Req'n 3, 1917, G. A. A. Naval Supply Account, S. and A.—Sch. 9485.)

To be delivered as specified below at such times and in such quantities as may be required during the fiscal year ending June 30, 1917.

Stock Classification No. 8.

7 200,000 tons steaming coal, as follows:

a. For delivery f. o. b. vessels or barges under chutes at respective piers, Hampton Roads, Va., per ton.....	$2.80	$560,000.00
b. For delivery f. o. b. vessels under chutes at piers, Philadelphia, Pa., per ton...	.....	.....

For extra charges for all work done, if required, on reasonable notice, in loading from Government barges, trimming and stowing into bunkers of the United States hospital ship Solace and
9 other Government-owned vessels not in position to handle their own coal, per ton of 2,240 pounds as follows:

a. In Hampton Roads, Va., in regular bunkers $.95 per ton.

b. In Hampton Roads, Va., in side bunkers, $1.25 per ton.

c. In Norfolk Harbor, Va., in regular bunkers, $.75 per ton.

d. In Norfolk Harbor, Va., in side bunkers, $.90 per ton.

Unit prices only are desired.

If barges other than Government barges are used for any deliveries at Hampton Roads, within Norfolk Harbor limits, the Gov-

ernment will pay an additional charge of (to be inserted by bidder) — per ton for barging and towing.

Each bidder must insert in the blank spaces the following information regarding the coal he proposes to furnish, without which information the proposal will be informal:

(*a*) British thermal units per pound of "dry coal" 14,800.

(*b*) Percentage of ash in "dry coal" 6%.

(*c*) Percentage of sulphur in "dry coal" 75.

(*d*) Percentage of volatile matter in "dry coal" 18 to 20.

(*e*) Percentage of moisture in coal as received 2½%.

For general specifications and conditions see front page of this schedule.

10 (9485.)

C. For delivery f. o. b. cars at the mines, per ton, $1.40.

For Pocahontas Run of Mine Steam Coal, over the Piers of the Norfolk & Western Railway Co., Lamberts Point, Norfolk, Va., to be shipped from the following mines:

Name of mine.	Location.
Thelma	Carter Coal Co. (Virginia Pocahontas Coal Co.) Coalwood, McDowell Co., West Va., mining Sewell Seam.
Nora	Carter Coal Co. (Virginia Pocahontas Coal Co.) Coalwood, McDowell Co., West Va., mining Sewell Seam.
Empire	Empire Coal & Coke Co., Landgraff, McDowell Co., West Va., mining No. Three Seam.
Elkhorn	Elkhorn Coal & Coke Co., Maybury, McDowell Co. W. Va., mining No. Three Seam.
Turkey Gap	Turkey Gap Coal & Coke Co., Ennis, McDowell Co., W. Va., mining No. Three Seam.
Central Pocahontas No. 1 & No. 2	Central Pocahontas Coal Co., Gary, McDowell Co., W. Va., mining No. Three Seam.

Also with the privilege of supplying coal from other mines in the Pocahontas Coal Field, whose product may be acceptable to the Navy Department.

General Specifications and Conditions Governing all Classes of This Schedule as Applicable.

Quantities Estimated.

It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantity of the coal specified which may be needed for the naval service at the places named during the period from July 1, 1916, to June 30, 1917, irrespective of the estimated quantities stated, the Government not being obligated to order any specific quantity.

The estimated quantities have been arrived at from records of previous purchases. While they represent the best information obtainable as to the quantities which will be required during the period covered by the contract, they are estimated only, and are not to be considered as having any bearing upon the quantity which the Government may order under the contract.

Quality.

Coal to be best quality, steaming, semi-bituminous, rune of mine, with at least 40 per cent lump, suitable and acceptable for the uses of the naval service.

Coal must be dry and practically free from slate, dirt, sulphur, and other impurities, subject to the usual inspection and test, and must weigh 2,240 pounds per ton, the weight to be determined in a manner satisfactory to the Government.

Deliveries.

Deliveries to be made promptly, and in lots or quantities specified for different ports named, on call, and at the prices accepted by the department, irrespective of commercial conditions or business stress, on the order of the Bureau of Supplies and Accounts or its representatives at the different ports of delivery.

Freight Terminal Charges.

In the case of coal delivered at the piers at Hampton Roads, Va., Baltimore, Md., Charleston, S. C., and Philadelphia, Pa., dumping, skidding, trimming, leveling, and wheeling, if required and assessed by the railroad company as additional charges to that covering transportation, will be paid for by the Government for Government owned vessels only at the rates established by the freight tariffs of the respective railroad companies as accepted by and on file with the Interstate Commerce Commission.

Payments.

Payments at the contract prices will be made from time to time for accepted deliveries.

Reservations.

The Government reserves the right to reject any or all bids for the different ports of delivery named; the right is also reserved to make such distribution of tonnage among the different bidders for suitable and acceptable coals for the naval service as will be considered to be for the best interests of the Government.

Notes.

(*a*) Bids on less than the entire quantity of coal specified under each class will be received and considered. Such partial bids must state the amount of tonnage it is proposed to furnish, subject to the other conditions of these specifications.

(*b*) Contractors will not be held responsible for fulfillment of their contracts during any war in which the United States may be engaged and which may affect them, or if prevented from doing so by strikes, or combinations of miners, laborers, or boatmen, accidents at the mines, or interruption or shortage of transportation. In such cases the obligation to deliver coal under their contracts will be canceled to an extent corresponding to the extent or duration of such war, strikes, combinations, accidents, interruption, or shortage, and no liability shall be incurred by the contractors for damages resulting from their inability to fulfill their contracts on account of the aforementioned causes.

(*c*) The Government will require satisfactory evidence that all coal delivered under each contract has been furnished from the mines accepted.

13 (*d*) Bidders must designate the commercial name of the coal, the name or other designation of the coal bed or beds, and the name and exact location of the mine or mines from which they propose to supply the coal bid upon, and put this information in a separate sealed envelope accompanying the bid. This envelope will not be opened at the time the bids are made public, and the information will be kept absolutely confidential by the department until the award is made. In case the coal offered is from a mine the name of which has been changed since last bid upon, the bidder will state the old as well as the new name assigned the particular mine.

(*e*) Contractors unable to supply the coal from the mines on which their contracts were made will be permitted to make application to the department for permission to supply coal from other mines in case of special emergency. The department reserves the

right to refuse or grant such permission, it being understood that in all such cases where substituted coal is furnished the contractors will be charged with the same responsibility for furnishing acceptable coal as if the coal came from the mines accepted; and the failure of such substituted coal to come up to the requirements of the department will be sufficient cause for canceling the entire contract.

(*f*) Prices quoted must be net prices and not subject to any increase on account of freight rates.

The terms of the formal contract of number stated on the face hereof and as entered into by the contractor as party of the first part, and the Paymaster General of the Navy, as party of the second part, provide that—

2. It is hereby mutually and expressly covenanted and agreed by and between the parties hereto that the article or articles to be furnished or services to be performed under this contract shall conform in all respects to the requirements of the specifications hereunto annexed, which specifications, the "Instructions, Deliveries, and Conditions," printed on the proposal of the said part of the first part, shall be deemed and taken as forming a part of this contract with like operation and effect as if the same were incorporated herein; and, in any case where the specifications do not explicitly pro-
14 vide to the contrary, all workmanship and materials entering into the manufacture or construction of any article or articles under this contract, shall be of the very best commercial quality and manufacture; and said article, articles, or services shall upon delivery or completion, be subject to inspection and examination by the officer or officers authorized by the said party of the second part to inspect and examine the same; and no article furnished or services performed under this contract shall be accepted until it or they shall have been inspected and approved by such officer or officers; and any of said articles not so approved shall be removed by the said party of the first part at — own expense, and within ten days after notification.

3. It is further covenanted and agreed, as aforesaid, that time is an essential element of this contract, and that, if the said party of the first part shall fail to make delivery of any or all of the articles or materials or to perform any or all of the services herein contracted for, in conformity with the conditions and requirements of the contract, and within the time or times prescribed, the said party of the second part will be damaged thereby; and the amount of said damages is hereby fixed and agreed to in advance, as liquidated damages and not as penalty, and the said par-y of the second part shall make deductions from the contract price accordingly, as follows, viz.:

For each day's delay, Sundays and holidays excepted, until satisfactory delivery or performance shall have been made, or until such time as the party of the second part may procure the same as hereinafter provided, at the rate of one-twentieth of 1 per cent of the contract price, the deductions, however, not to exceed in any case

10 per cent of the stipulated value of the articles or materials not so delivered, or of the services not so performed; rejection of deliveries or performance not to be considered as waiving deductions; Provided, that no liquidated damages shall be deducted for such period after the expiration of the time or times prescribed for delivery or performance, as, in the judgment of the party of the second part, shall equal the time that, either in the beginning or in the
15 prosecution of the deliveries or services contracted for, shall have been lost on account of any cause for which the United States is responsible, or on account of strikes, riots, fire, or other disaster, delays in transit or delivery on the part of transportation companies, or any other circumstances beyond the control of the contractor, but such circumstances shall not be deemed to include delays on the part of sub-contractors in furnishing materials when such delays arise from causes other than those herein specified; and provided further, that the question whether delays are due to causes herein specified shall be determined by said party of the second part.

4. It is further covenanted and agreed that if the said party of the first part shall fail in any respect to perform the contract the same may, at the option of the United States, be declared null and void, wi-hout prejudice to the right of the United States to recover for defaults therein or violations thereof, or the said party of the second part may purchase or procure in such manner and from such person or persons as he deems proper, paying such price therefor as may be necessary in order to procure the same, such of said articles or materials of the kind specified as near as practicable, or procure the performance of such services, as the said party of the first part shall fail to deliver or perform as required, and may demand and recover from the said party of the first part the difference between the price so paid therefor and the price stipulated in the contract; and the amount of such difference shall be paid by the said party of the first part to the said party of the second part on demand.

5. It is further covenanted and agreed that the said party of the first part shall indemnify the United States, and all persons acting under them, for any liability on account of any patent right granted by the United States that may be affected by the adoption or use of the articles herein contracted for.

6. It is further covenanted and agreed that in carrying out the provisions of the contract no person shall be employed who is undergoing sentence of imprisonment at hard labor which has been
16 imposed by a court of the United States, or any State, Territory, or municipality having criminal jurisdiction; that the contract is upon the express condition that no Member of or Delegate to Congress, nor any person belonging to or employed in the naval service is, or shall be, admitted to any share or part therein or any benefit to arise therefrom except as a member of a corporation; and that any transfer of the contract, or of any interest therein, to any person or party by the said party of the first part shall annul the same, so far as the United States is concerned.

7. And this contract further witnesseth, that the United States, party of the second part, in consideration of the foregoing stipulations, do hereby covenant and agree, to and with the party of the first part, as follows, viz:

That upon the presentation of the customary bills, and the proper evidence of the delivery, inspection and acceptance of the said articles, or services, and within ten days after such evidence shall have been filed in the Bureau of Supplies and Accounts, there shall be paid to the said contractor, or to his order, by the Navy Pay Officer at Washington, D. C., (Disbursing Office), the sum found due for the articles delivered or services performed under this contract, provided, however, that no payments shall be made on any one of said classes until all the articles or services embraced in such class shall have been delivered or performed and accepted, except at the option of the party of the second part.

Bond for $140,000 with Casualty Company of America as Surety.

Respectfully,

S. McGOWAN,
Paymaster General of the Navy.

J. L. S.

To Wm. C. Atwater & Co., 1 Broadway, New York, N. Y.

17 II. *General Traverse.*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. *Argument and Submission of Case.*

On October 18, 1921, this case was argued and submitted on merits by Mr. Karl Knox Gartner, for the plaintiff, and by Mr. Alexander H. McCormick, for the defendant.

18 IV. *Findings of Fact, Conclusion of Law, and Opinion of the Court by Downey, J.*

Entered November 21, 1921.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff is and has been at all times herein mentioned a corporation of the State of New York engaged in the business of shipping Pocahontas smokeless coal and coke, having its office and

principal place of business at No. 1 Broadway, New York City, and operating branch offices in Boston, Norfolk, Cleveland, Bluefield, London, and elsewhere.

II.

In the spring of 1916 the Navy Department, being desirous of procuring contracts for coal for that department for the next ensuing fiscal year to be delivered in varying quantities at different stations, issued its invitation for bids in the form of a schedule numbered 9485, containing general specifications and conditions and printed forms of proposals for deliveries in stated quantities at ten different ports or stations. Included therein and designated as "class 18" was a form of proposal for the furnishing of 600,000 tons of steaming coal to be delivered f. o. b. vessels or barges under chutes at respective piers, Hampton Roads, Virginia.

The general specifications contained the following provisions under the subhead "Quantities estimated":

"It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantity of the coal specified which may be needed for the naval service at the places named during the period from July 1, 1916, to June 30, 1917, irrespective of the estimated quantities stated, the Government not being obliged to order any specific quantity.

19 "The estimated quantities have been arrived at from the records of previous purchases. While they represent the best information obtainable as to the quantities which will be required during the period covered by the contract, they are estimated only and are not to be considered as having any bearing upon the quantity which the Government may order under the contract."

Under the subhead "Reservations" appeared the following:

"The Government reserves the right to reject any or all bids, and in accepting any bids for the different ports of delivery named the right is also reserved to make such distribution of tonnage among the different bidders for suitable and acceptable coals for the naval service as will be considered to be for the best interests of the Government."

Under the subhead "Notes" appeared the following:

"(*a*) Bids on less than the entire quantity of coal specified under each class will be received and considered. Such partial bids must state the amount of tonnage it is proposed to furnish, subject to the other conditions of these specifications.

"(*b*) Contractors will not be held responsible for fulfillment of their contracts during any war in which the United States may be engaged and which may affect them, or if prevented from doing so by strikes or combinations of miners, laborers, or boatmen, accidents at the mines, or interruption or shortage of transportation. In such cases the obligation to deliver coal under their contracts will be

canceled to an extent corresponding to the extent or duration of such war, strikes, combinations, accidents, interruption, or shortage, and no liability shall be incurred by the contractors for damages resulting from their inability to fulfill their contracts on account of the aforementioned causes."

III.

The plaintiff on said form submitted its proposal for the furnishing of 200,000 of said 600,000 tons at $2.80 per ton, and was notified of the acceptance of its proposal to furnish said amount. On June 5, 1916, a contract numbered 26,488, and made a part of the petition herein by reference as Exhibit A, was entered into between the parties. The contract in its physical construction was made up largely of portions of the general specifications, notes, etc., and the printed proposals contained in said schedule numbered 9,485, which were clipped therefrom and pasted on and thus made a part of the contract, and the paragraphs quoted in Finding II, were thus made a part thereof.

IV.

On March, 26, 1917, plaintiff was informed by the Paymaster General of the Navy that it had been ascertained that the quantity estimated in its contract would be exceeded by about ten per cent. In reply to this communication the plaintiff expressed its surprise, stated that it had not bid on tonnage in excess of 200,000 tons, called attention to heavy curtailment in production at its mines, due to shortage of cars and labor, because of which it had only been able to deliver 75 per cent of other contracts, in view of which it was felt by its operatives that they had met in full their obligations to the Government by delivering 100 per cent of the 200,000 tons during the contract period. In reply thereto the Paymaster General of the Navy cited quoted provisions of the contract as authority for the requiring thereunder of an additional tonnage over and above the 200,000 tons, stated that the excess tonnage required was being prorated and the same requirements were being made of other contractors, and that the contract price must apply to the total requirements during the fiscal year.

On April 17, 1917, the plaintiff called attention to the "Relief clause" in the contract "Notes (*b*)," (Finding II), submitted a statement as to available car supply and maintained that on that basis it was only obligated to deliver up to April 1, 1917, 148,357 tons, whereas it had actually delivered to said date 160,377 tons, a claimed excess of 12,020 tons, and stated that "the total of 220,000 tons above referred to is subject to the reduction of 12,020 tons, making the actual tonnage deliverable by us under our contract 207,980 tons." To this communication the Navy Department replied by letter of April 30th insisting that the ten per cent additional must be delivered under the contract and in reply to the claim based on transportation conditions (under note (*b*) of the contract) informed the plaintiff that—

"It can not be recognized that you are entitled to any relief on account of such shortage of equipment as may have been experienced; as, in this respect, the Navy is accorded preferential treatmnet and this department has not failed to obtain the cars required by its suppliers when requests for cars to move Navy tonnage have been received."

Replying to this letter of the Navy Department the plaintiff stated that it did not agree with the Navy Department, but admitted that the Navy Department had for some time been accorded preferential treatment in the matter of cars and conceded that the preferential arrangement be related back to January 1, 1917, and on that basis stated that "The total of 220,000 tons requisitioned by the department under our contract is therefore subject to reduction to the extent of 8,219 tons, making the actual tonnage deliverable under the contract 211,781 tons." On April 26, 1917, the Navy Department informed the plaintiff that it was entirely impracticable for the department to recede from its request for the ten per cent additional over the estimated quantity in the contract. On May 22, 1917, the plaintiff, acknowledging an assignment to it of 10,000 tons to be delivered at Lamberts Point between June 1 and 10, stated the condition of its contract, showing 204,430.19 tons delivered and assignments to barges of 2,650 tons, a total of 207,080.19 tons, and stating that "The above assignment added to this tonnage will make a total of 217,080.19 tons, leaving 2,920 tons still to go all rail."

On June 2, 1917, plaintiff wired the department referring to recent telegrams and saying:

"We beg to call attention to department's notice to us under date March twenty-sixth we would be required to deliver contract tonnage plus ten per cent, eighty-two hundred nineteen tons of which by reasons of short car supply we are delivering under protest. With completion of your requisition for ten thousand tons May
21 twenty-first, two hundred and twenty thousand tons will have been delivered, being eighty-two hundred nineteen tons in excess of tonnage required to complete contract."

V.

The plaintiff delivered to the Navy Department 219,990 tons of coal, being 19,990 tons in excess of the estimated quantity stated in the contract; 211,781 tons (being 220,000 tons, less 8,219 tons) were billed at $2.80 per ton, the contract price, and the remainder was billed at $6.25 per ton. All was paid for at the contract price, but the plaintiff protested acceptance of the contract price for the excess over 211,781 tons. At the time the amount of coal over 200,000 tons was delivered to the Navy Department the market value thereof was $6.50 per ton; 19,990 tons of coal then furnished by the plaintiff to the Navy Department were worth in the market $73,964.48 in excess of the contract price therefor.

Conclusion of Law.

Upon the facts found the court concludes, as matter of law, that the plaintiff is not entitled to recover and that its petition herein ought to be dismissed with judgment against it for the cost of printing, to be taxed by the clerk, and judgment is directed accordingly.

Opinion.

DOWNEY, *Judge*, delivered the opinion of the court:

This case as presented is in essential respects like and must be controlled by the case of Willard, Sutherland & Company v. United States, decided November 7, 1921, and detailed discussion will, therefore, not be deemed necessary.

The chief difference is found in the fact that this plaintiff seems to have conceded the right of the defendant to require them to furnish an additional quantity of coal over and above the estimated quantity stated in their contract, but claimed that under another clause of the contract they were relieved from furnishing 8,219 tons, and as to that only they demanded the market price. If the case were presented here on the basis of the contention thus made we would have difficulty in finding merit in it, but that theory is abandoned and the claim made here, as in the Sutherland case, is for the market price for all coal furnished in excess of the estimated 200,000 tons. The effect upon plaintiff's case, as presented, of some of the facts found as to its attitude during the progress of the contract and its complete departure now from its claimed rights, then, both in theory and amount, might be discussed, but, apparently, no good purpose could be served. Upon the authority of the Sutherland case the plaintiff's petition must be dismissed.

Graham, Judge; Hay, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

22 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Twenty-first day of November, A. D., 1921, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order, adjudge and decree that William C. Atwater and Company, Inc., as aforesaid, is not entitled to recover any sum in this action of and from the United States; and that the plaintiff's petition herein be and the same hereby is dismissed; And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of Two hundred and twelve dollars and seventy-five cents ($212.75) the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By THE COURT.

VI. *Plaintiff's Application for and Allowance of an Appeal.*

From the judgment rendered in the above-entitled case on the twenty-first day of November, nineteen hundred and twenty-one, the plaintiff by its attorneys on the fifth day of December, nineteen hundred and twenty-one, makes application for and gives notice of an appeal to the Supreme Court of the United States.

BAKER & BAKER,
Attorneys for Plaintiff.

Filed December 5, 1921.

Ordered: That the above appeal be allowed as prayed for.

By THE COURT.

December 5, 1921.

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Court of Claims.

No. 34215.

WILLIAM C. ATWATER & COMPANY, INCORPORATED,

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law entered by the Court; of the opinion of the Court by Downey, J.; of the judgment of the Court; of the plaintiff's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Seventh day of December, A. D., 1921.

[Seal of Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 28,593. Court of Claims. Term No. 638. William C. Atwater & Company, Inc., appellant, vs. The United States. Filed December 8th, 1921. File No. 28,593.